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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 403

GEORGE SCHMIDT,

Petitioner,

vs.

UNITED STATES OF AMERICA AND TUCKER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals, For the Seventh Circuit.

(Brief and Opinion Below, Annexed.)

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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to the United States Court of Appeals,
For the Seventh Circuit.

THE MATTER INVOLVED.

Petitioner, a stockholder of Tucker Corporation, acting in the derivative right of the corporation, sued the United States under the Tort Claims Act. (Tr. 3.)

His complaint charges that members and agents of the Securities and Exchange Commission, acting singly, or in conspiracy with the Department of Justice, or in conspiracy with non-governmental concerns, committed the

the cited statutes governing SEC **(15 U. S. C. 77t and 78u).**

(b) And also contrary to the intent of the Federal Tort Claims Act **(28 U. S. C. 1346).**

(c) And in conflict with decisions of other Courts of Appeals and the Supreme Court, holding that the conduct of the SEC is subject to judicial investigation and remedy, and specifically that "there is nothing in the Act which authorizes *publicity in advance of hearing*", which, this opinion says, is the first specified wrong charged in the complaint,—"giving out information that an investigation was *about to be* instituted." (Tr. 54.)

Bank of America National Trust and Savings Assn. v. Douglas (C. A. D. C., 1939), 105 F. 2d 100, 105.

Jones v. Securities and Exchange Commission (1936), 298 U. S. 1, 26, 56 S. Ct. 654, 662.

The complaint in this case, as summarized in the opinion (Tr. 49-50, 52), and as appears in even stronger language in the record (Tr. 4-6), *charges,* the motion to dismiss *admits,* and the opinion erroneously *sanctions,* a shocking, corrupt, dictatorial and conspiratorial course of conduct by this government agency, which none of these statutes sanction and which the federal courts should not sanction.

The opinion erroneously says that the quoted SEC statute **(15 U. S. C. 77t and 78u)** "*authorized such conduct*" and confers "*discretion*" so to do. (Tr. 54.)

2. The opinion ambiguously quotes the exceptions section of the Federal Tort Claims Act **(28 U. S. C. 2680)** without saying (a) whether the court believes this section has a bearing on this case, or (b) what bearing the court

thinks the section has on the case. (Tr. 55.) If the opinion means to imply that this section excludes this gross tort from the Tort Claims Act, it emasculates the Act by implication. Neither the "due care" nor "discretionary function or duty" clauses of the section exclude the shocking course of conduct charged in this complaint and sanction in this opinion. There is no "discretion" for any governmental agency in the United States (or any country this side of the iron curtain) to commit the corrupt, wanton and dictatorial course of conduct sanctioned in this opinion.

An important distinction bearing on both above grounds (1) and (2), and ignored in the opinion, is that the complaint is *not based* upon the primary exercise of discretion *to make the investigation* of Tucker Corporation but upon tortious acts *committed in the ministerial stage* of carrying out the investigation *after* the discretionary function had been exercised.

Failure to observe this distinction between immunity for basic *determinations* made at the *policy-making level,* and *ministerial* acts in carrying them out:

(a) Gives blanket license for oppressive and dictatorial acts of government agents, high and low, in carrying out the determination; and—

(b) Conflicts with the following decisions in other circuits and this same circuit, which hold that the immunity *ceases* at the *policy-making level* where the basic determination is made (in this case, the determination to investigate the corporation) and *does not extend to cloak tortious conduct in carrying out the determination*:

Oman v. United States (10 Cir., 1949), 179 F. 2d 738, 740, par. 1.

Costley v. United States (5 Cir., 1950), 181 F. 2d 723, 724, par. 2.

Stewart v. United States (7 Cir., 1951), 186 F. 2d 627, 630-631.

Note: A straightforward and proper petition for rehearing on the above grounds (Tr. 59-61) was met by an arrogant and personally abusive answer by the United States attorney, attempting to distort the petition into a contempt of court. (Tr. 67-70.)

WHEREFORE, petitioner prays that a writ of certiorari may issue to review the decision below.

JAY E. DARLINGTON,
JOHN R. JEFFERS,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

GEORGE SCHMIDT,

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vs.

UNITED STATES OF AMERICA AND
TUCKER CORPORATION,

Respondents.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

Why the Case Merits Review.

The need for review rests upon:

(1) The flagrant character of the tort described on the face of the opinion, and—

(2) The important and dangerous ruling that this corrupt and conspiratorial conduct—

> "is clearly and specifically *within the discretionary powers and duties* of the Securities and Exchange Commission." (Tr. 54.)

and that

> "It seems therefore to be perfectly clear that under the terms of the applicable statutes the plaintiff in this controversy *cannot* upon a trial establish a case *which*

would entitle the Tucker Corporation to damages from the Government. * * *

"Because, the complaint *fails to state a claim* against the United States upon which relief can be granted, the judgment of the District Court is affirmed." (Tr. 55.) (Our emphasis.)

Nature of the Tort Charged.

The corrupt and conspiratorial conduct of the government employees plainly appears from the following summary of the complaint in the opinion (our italics):

"Upon information and belief plaintiff-appellant alleges that in the spring and summer of 1948, Tucker Corporation was preparing to start 'mass production of a new type, rear-engine automobile, which would compete in interstate commerce with the products of other automobile manufacturers.' It is also charged on information and belief that the said corporation was then 'particularly vulnerable to the type of interference and injury hereinafter described,' because, in preparation for production, it had invested 'most of its original cash capital in tangible and intangible assets, including machinery and equipment, inventory of material, engineering and advertising expenses, and rental.' Said corporation, it is said, was then lessee and occupant of a large plant and had started the initial production of parts, and 'pilot-type' models of its automobile. Its cash was running low, but it had 2,000 dealers and distributors owing a balance of nearly $4,000,000 on their franchise notes; it enjoyed good commercial and financial relations with concerns doing business with it, and it is said that it had good business relations with the automobile buying public from the sale of its accessories; that it could, and, in the normal course of events, would have succeeded in going forward with the mass production of its automobile.

"It is then charged, again on information and belief, that from the summer of 1948, up to and until March 3, 1949, the Securities and Exchange Commission, and

'the members and agents thereof, engaged in a *course of conduct* toward said corporation which was of such character that in the normal course of events it would have and did *interfere with and injure and destroy said corporation's business.*' It is alleged that said course of conduct consisted, among other things, of the following: (1) That they gave out *surreptitiously,* or caused or permitted to be given out, to a radio broadcaster, the statement that said corporation was *about to be* investigated, knowing that the statement would be broadcast on a nationwide hookup; (2) that in the summer of 1948, they began and carried forward an inquisition against said corporation, its business and its product, in the course of which they interfered with and interrupted the corporation's use of its records and files; they *intimidated* the persons and dealers doing business with the corporation; they *caused to be propagated a rumor* that the corporation was tainted with fraud and illegality; (3) that about March 1, 1949, one of the members of the Commission *surreptitiously* took from its files 'a supposedly secret report' of said inquisition and turned it over to the representative of a *Detroit* newspaper who publicized the contents thereof.

"The complaint then continues:

> 'It is presently impossible for this plaintiff to describe in more detail the aforesaid course of conduct referred to in this paragraph (b), because the facts constituting the same are peculiarly within the knowledge and possession of the defendant and its said agency and agents.'

"The complaint then goes on to allege alternatively, and still upon information and belief, that the tortuous acts in question were committed by the Commission, its members and agents, or by them in *concert* with other agencies of the United States, including the Department of Justice or by them in *concert* with persons and 'concerns' not connected with the Government, *who desired the destruction of said corporation's business.*

"The complaint then charges, still on information

and belief, that said *course of conduct* was entered into and carried out with *intent to destroy* said corporation in its business; and with intent to *prevent* the manufacture and *competition* of its product in *interstate commerce,* and with *wilful* and *wanton* disregard of the consequences which would and did result therefrom.

"Damages were then claimed in the sum of $50,000,000. The complaint asserts that 'there has been inflicted upon said corporation: (1) The *common law tort* of injuring and destroying its business; (2) the *statutory tort* of preventing the manufacture and sale of its product in interstate commerce, contrary to federal anti-trust laws, but this action seeks only compensatory and not punitive damages for this latter tort.'" (Our italics.)

Opinion, Tr. 49-50.

It should be noted that the tortious conduct charged is not *confined* to the three specifications (though these would suffice). The above quoted part of the opinion shows that the basic charge of the complaint was a "course of conduct" by the government employees which was designed to and did accomplish the corrupt and conspiratorial purpose of destroying the corporation's business and excluding its product from interstate commerce. The specified acts are only "among other things" which made up the course of conduct (Tr. 5, 49) and the other parts of the course of conduct are peculiarly within the knowledge of the defendant and cannot now be further specified. (Tr. 5, 50.)

No question is here involved concerning plaintiff's derivative right to sue for his corporation. The opinion is squarely predicated on the ground that *Tucker Corporation has no right to relief.* (Tr. 55.) That the above conduct would be tortious and actionable if done by a private person or corporation is not denied in the opinion, and, for present purposes, is sufficiently indicated by the following recent text:

"There are certain relations affecting a man's trade,

occupation, profession, or means of gaining a livelihood, interference with which, by a stranger, may under certain circumstances or conditions result in liability *wholly apart* from any question of status or *contract*. * * * Holt, Ch. J., made the broad statements that 'where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases.' (Our emphasis.)

30 Am. Jr., Interference, sec. 37, pp. 85, 86.

"No persons, individually or by combination, have the right, directly or indirectly, to interfere with or disturb another in his lawful *business* or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit will sustain an action." (Our emphasis.)

30 Am. Jur., Interference, sec. 38, pages 86-87.

"Because of the constant tendency to confuse 'malice', signifying absence of justification, with 'ill will,' it is deemed advisable to preface the statements in this section by a reiteration of the meaning of the term, as set forth in another article in this work, to the effect that 'malice in its legal sense does not necessarily signify ill will toward a particular individual but denotes that condition of mind which is manifested by *the intentional doing of a wrongful act without just cause or excuse.* * * * An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious. *Anyone who invades a right of another without lawful cause or justification commits a legal wrong.*" (Our emphasis.)

30 Am. Jur., Interference, sec. 39, pages 87-88.

"The interference, by coercion, with the right of a person to enter into, or continue in, any lawful *business*,

> profession, or other line of legitimate endeavor is an unlawful act, *if unjustified,* and a *combination* having such an object in view constitutes a criminal conspiracy." (Our emphasis.)
>
> 30 Am. Jur., Interference, sec. 40, page 89.

As indicated in the part of the text first above quoted, this common law tort is distinct from the tort of interference with *contract,* which is excluded from the Tort Claims Act. **(28 U. S. C. 2680(h).)**

In addition to the above common law tort, it is plain that the conduct above charged, if done by a private person or corporation in concert (conspiracy) with others, would constitute the *statutory tort* of preventing the manufacture and sale of this corporation's product in interstate commerce. **(15 U. S. C. 1 and 15.)** The Tort Claims Act does not preserve any general immunity from statutory torts **(28 U. S. C. 1346)** and this one is not excluded by the exceptions section. **(28 U. S. C. 2680.)**

It is not necessary for plaintiff to establish both torts,—the existence of either one suffices.

Erroneous Extension of "Discretion" and "Duty" to Cover Oppressive Ministerial Acts of Government Employees.

The opinion does not deny, but assumes, that both the above torts would exist and be actionable if a private person or corporation had done to Tucker Corporation what these government employees did.

The opinion rests entirely on the premise that this conduct "is clearly *within the discretionary powers and duties* of the Securities and Exchange Commission." (Tr. 54.)

But the sections of the Securities and Exchange Act **(15 U. S. C. 77t and 78u)** quoted in the opinion (Tr. 53)

give this Commission no broader power

ower than many other

regulatory agencies. The power is:

ine if the SEC statute

(1) To "investigate" to determine i

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or regulations have been violated or ar

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(2) "To publish information conce

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gation,—not to *precede* the investigati

radio broadcaster to

leaked out of the Commission to a rad

This practice was con-

be used *before* the investigation. This

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in the following case, where the SEC eng

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ful and oppressive conduct of publicizin

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against a banking corporation *before* inv

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damaging the corporation's business an

Court enjoined the SEC, saying:

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> "The Securities Exchange Act au
> mission in its discretion to make inv
> make public its findings, but there
> *Act* which authorizes publicity in *ad*
> • • • It is not difficult to see t
> might easily be made an *instrument*
> lacking specific congressional autho
> it ought not to be indulged. In add
> trial publication of evidence—labele
> true—ought, we think, to be avoi
> emanating from the tribunal charge
> responsibility of weighing it and assi
> a fair hearing." (Our emphasis.)

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in *advance* of hearing.
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ust & Savings Ass'n. v. Bank of America Nat. Trust & Douglas (C. A. D. C., 1939), 1

)39), 105 F. 2d 100, 105.

oined in the above case

The conduct condemned and enjoined to that charged in this was milder than, but analogous to tha es that the SEC *before* complaint. This complaint charges tha out a *smear* statement investigation, *surreptitiously* gave out a

to a radio broadcaster, and then engaged in a course of *intimidation* and *rumor-mongering,* followed again by *leaking* the contents of its secret investigation report to *one* newspaper (in *Detroit,* significantly, the seat of this corporation's competitors) to be used by it for another smear. (Tr. 5-6.)

In refusing to let the SEC pursue an *oppressive* and illegitimate court of conduct of examining a citizen after he had withdrawn his his registration statement, the Supreme Court said:

> "Since here the only disclosed *purpose* for which the investigation was undertaken had ceased to be *legitimate* when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition • • • for the chance that something discreditable might turn up.' (*Ellis* v. *Interstate Commerce Com.,* 237 U. S. 434, 445, 35 S. Ct. 645, 647, 59 L. Ed. 1036,—an undertaking which uniformly has met with judicial condemnation." (Our emphasis.)
>
> **Jones v. Securities and Exchange Commission (1936), 298 U. S. 1, 26, 56 S. Ct. 654, 662.**

The illegitimate conduct and purpose of the SEC above condemned (conducting a fishing expedition) was mild compared to that charged in this complaint and admitted in this opinion. (Tr. 5-6, 49-50, 52.)

While ignoring the above precedents limiting and remedying abuses of the Commission's powers, the opinion cites (the only case cited in the opinion) **Oklahoma Texas Trust v. Securities and Exchange Commission (10 Cir. 1939) 100 F. 2d 888, 891,** for the proposition that: "The

manifest purpose of the Securities Act is to protect the public against imposition and fraud in the sale of securities in interstate commerce."

But that case is no authority that the conduct here charged is within the Commission's "discretionary powers and duties". (Tr. 54.) Rather, it shows how far this conduct departs from the purpose of the Act.

The opinion also says "the Act provides that any person hurt by an *order* of the Commission may petition the Court of Appeals • • • that such order be modified or set aside." (Tr. 54.) But this complaint does not complain because the Commission entered an order.

If there was initially an order or official determination of the Commission to make an investigation of this corporation (and the complaint and record are silent as to whether there was any such) it is not the *basis* of the complaint. The complaint is for the *surreptitious, oppressive, corrupt and conspiratorial conduct* of one or more of the Commission's members and certain of its employees, beyond the pale of the Commission's legitimate function and powers.

To hold that such oppressive, corrupt and conspiratorial wrongs against citizens or corporations are privileged and immune to remedy, simply because this Commission (or other similar regulating agency) exercises its "discretion" to "investigate", is to adopt the definition of those terms which prevails east of the iron curtain.

Prior to the Tort Claims Act, such conduct of government agencies was consistently recognized as *wrong*, but remediless. Now, to avoid the remedy, the opinion below holds that the conduct is *not wrong*,—a step backwards toward governmental tyranny. (Tr. 54-55.)

Distinction Between "Discretion" at the Policy-Making Level, and Oppression and Corruption at the Ministerial Level.

The necessary functions of this Commission and similar regulating agencies can be sufficiently preserved, while preventing them from becoming instruments of tyranny in carrying out their functions, by applying the common sense principle that the term "discretionary function or duty" in the exceptions section of the Tort Claims Act **(28 U. S. C. 2680)** applies to the *making of determinations* at the *policy making level* as to whether or not to exercise a certain power (in this case, the determination to investigate the corporation), but that it does not apply to the *ministerial course of conduct* by government employees, high or low, in executing or carrying out those determinations.

This distinction has been recognized in other circuits and even in this same circuit, in the following cases which basically conflict with the result of the opinion below, and which are ignored in the opinion:

In the following case the plaintiff's business consisted of grazing cattle upon Government lands under Government permit. The Government agents had discretion to revoke the permit and thereby make a lawful interference with the plaintiff's business. But instead of doing this, they went beyond the bounds of their discretion by acting in concert with competitors of the plaintiff "with intent to injure and destroy" the plaintiff's rights. The Court of Appeals, in reversing the District Court's dismissal of the complaint, said:

> "Eliminating the claim arising out of misrepresentation, the tortious acts, if any, bringing this case within the jurisdiction of the federal courts, consist *of aiding* and *encouraging* other livestock owners to utilize the grazing lands adjacent to the lands owned

in fee, and of aiding and directing similar acts, *with intent to injure and destroy* plaintiff's exclusive grazing privileges, coupled with the refusal to cancel plaintiff's predecessor's permits, on the grazing lands adjacent to the leaseholds.

"Such acts are not within the exception to the Tort Claims Act based upon discretionary functions. No government employee is *granted the discretion whether* he shall induce or incite third persons to *interfere* with exclusive rights or privileges granted by the United States." (Our emphasis.)

Oman v. United States (10 Cir., 1949), 179 F. 2d 738, 740, par. 1.

In the following case the Government agents exercised this discretion as to whether they would or would not furnish maternity hospital service to a soldier's wife. They determined to furnish the service, and then injured her by negligent treatment. The Court of Appeals, in reversing the District Court's dismissal of the complaint, said:

"In order to determine whether or not the government comes within the exemption set out above, we must decide *whether or not it was exercising* a *discretionary* function or duty when its employees *negligently injected* a harmful substance into Mrs. Costley's body. We think they were *not* exercising a discretionary function, because they had *already exercised* their discretion by admitting her into the hospital, and once having admitted her and undertaken the delivery of her child, they were under a duty to attend and treat her." (Our emphasis.)

Costley v. United States (5 Cir., 1950), 181 F. 2d 723, 724, par. 2.

The same principle is implicit in **Stewart v. United States, (7 Cir. 1951) 186 F. 2d 627, 630-631,** holding the United States liable under the Tort Claims Act for injury to a boy from the negligent and unlawful manner of

storing grenades at Fort Sheridan. Any such storing necessarily was *preceded* by some *determination* at the policy-making level as to (1) whether to store, (2) what to store, (3) and where to store. In that sense, as in *every* case under the Act, the injury resulted *remotely* but *not directly* from a determination previously made at the policy-making level. But the injury in that case, as in our case, was directly and proximately caused by negligent or wrongful acts of Government agents or employees in the *manner of carrying out* the determination. In the *Stewart* case, the determination to do the storing could have been carried out in a lawful manner. In our case, the Commission's *determination* could and should have been carried out in a *lawful manner without the corrupt and collusive course of conduct* charged in the complaint.

Nearly every activity of a Government agent or employee, whether driving a truck or making up a report for the Securities & Exchange Commission examination, *originates* in the exercise of some discretionary function or duty by some superior. If the terms "discretionary function or duty" were stretched to cover the ministerial activities of governmental agents or employees in carrying out these determinations, few torts would be covered and the Act would be largely meaningless, contrary to the plain purpose of **28 U. S. C. 2674** as liberally construed by the Supreme Court in **Feres v. United States, (1950) 340 U. S. 135, 139-141, 71 S. Ct. 153, 156-157, 95 L. Ed. 152 and United States v. Yellow Cab Co. (1951), 340 U. S. 543, 547, 549-550, 71 S. Ct. 399, 402, 404, 95 L. Ed. 523.**

Therefore, it is respectfully submitted that the writ of certiorari should issue to bring up and review this case.

JAY E. DARLINGTON,
JOHN R. JEFFERS,
Attorneys for Petitioner.

APPENDIX.

(Bold face emphasis ours.)

In the

United States Court of Appeals

For the Seventh Circuit

No. 10581. OCTOBER TERM, 1951, APRIL SESSION, 1952.

GEORGE SCHMIDT,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA and TUCKER CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 3, 1952.

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Appellant seeks to reverse an order of the District Court which dismissed his action against the United States brought under the Federal Tort Claims Act.

The complaint alleges that the plaintiff-appellant is a citizen, resident and inhabitant of the United States within the Northern District of Illinois, Eastern Division, and that he is and was at the time of the happenings and events complained of the owner and holder of 1,000 shares of the capital stock, Class A, of the TUCKER CORPORATION, which he purchased from said corporation on the date of its issue. He charges that he begins and prosecutes the proceedings

as a derivative stockholder's action because said corporation, and those in charge of its affairs, have been and are unwilling and unable to do so. He alleges that the action is not collusive.

THE TUCKER CORPORATION is alleged to be a corporation for profit, having its principal office and place of business in Chicago, Illinois, within said district.

It is charged that the Securities and Exchange Commission is an agency of the United States of America.

Upon information and belief plaintiff-appellant alleges that in the spring and summer of 1948, TUCKER CORPORATION was preparing to start "mass production of a new type, rear-engine automobile, which would compete in interstate commerce with the products of other automobile manufacturers." It is also charged on information and belief that the said corporation was then "particularly vulnerable to the type of interference and injury hereinafter described," because, in preparation for production, it had invested "most of its original cash capital in tangible and intangible assets, including machinery and equipment, inventory of material, engineering and advertising expenses, and rental." Said corporation, it is said, was then lessee and occupant of a large plant and had started the initial production of parts, and "pilot-type" models of its automobile. Its cash was running low, but it had 2,000 dealers and distributors owing a balance of nearly $4,000,000 on their franchise notes; it enjoyed good commercial and financial relations with concerns doing business with it, and it is said that it had good business relations with the automobile buying public from the sale of its accessories; that it could, and, in the normal course of events, would have succeeded in going forward with the mass production of its automobile.

It is then charged, again on information and belief, that from the summer of 1948, up to and until March 3, 1949, the Securities and Exchange Commission, and "the members and agents thereof, engaged in a course of conduct toward said corporation which was of such character that in the normal course of events it would have and did interfere with and injure and destroy said corporation's business." It is alleged that said course of conduct consisted,

among other things, of the following: (1) That they gave out surreptitiously, or caused or permitted to be given out, to a radio broadcaster, the statement that said corporation was about to be investigated, knowing that the statement would be broadcast on a nationwide hookup; (2) that in the summer of 1948, they began and carried forward an inquisition against said corporation, its business and its product, in the course of which they interfered with and interrupted the corporation's use of its records and files; they intimidated the persons and dealers doing business with the corporation; they caused to be propagated a rumor that the corporation was tainted with fraud and illegality; (3) that about March 1, 1949, one of the members of the Commission surreptitiously took from its files "a supposedly secret report" of said inquisition and turned it over to the representative of a Detroit newspaper who publicized the contents thereof.

The complaint then continues:

> "It is presently impossible for this plaintiff to describe in more detail the aforesaid course of conduct referred to in this paragraph (b), because the facts constituting the same are peculiarly within the knowledge and possession of the defendant and its said agency and agents."

The complaint then goes on to allege alternatively, and still upon information and belief, that the tortuous acts in question were committed by the Commission, its members and agents, or by them in concert with other agencies of the United States, including the Department of Justice, or by them in concert with persons and "concerns" not connected with the Government, who desired the destruction of said corporation's business.

The complaint then charges, still on information and belief, that said course of conduct was entered into and carried out with intent to destroy said corporation in its business; and with intent to prevent the manufacture and competition of its product in interstate commerce, and with wilful and wanton disregard of the consequences which would and did result therefrom.

Damages were then claimed in the sum of $50,000,000. The complaint asserts that "there has been inflicted upon said corporation: (1) The common law tort of injuring and destroying its business; (2) the statutory tort of preventing the manufacture and sale of its product in interstate commerce, contrary to federal anti-trust laws, but this action seeks only compensatory and not punitive damages for this latter tort."

The complaint then alleges in division 5 thereof:

> "(a) This cause of action has been abandoned in fact and in law by the corporation's trustee to the corporation on and since February 20, 1951, and has thereby reverted to the corporation, and said abandonment was in fact made by the trustee with the approval of the court."

Relative to the inability of the corporate management to sue, the complaint alleges in division 5(b) that shortly after the trustee abandoned this cause of action to the corporation, the plaintiff stockholder informed all the available officers and directors of the corporation of the trustee's abandonment and of the existence of this cause of action. He made demand on them to have the corporation sue upon it before it became outlawed and lost, but they took no action.

It then charges:

> "Further, as plaintiff is informed and believes, said corporate management and board of directors is presently incapable of taking action and will not take action in this matter before this cause is outlawed and lost, because of the fact that they are widely scattered and have not met for a long time and are not likely to meet for the conduct of this or other corporate affairs, due to aforesaid destruction of the corporation's business. Plaintiff has exhausted all means within his knowledge and command, except by this action, to have said cause of action filed on behalf of the corporation before it becomes outlawed and lost. Accordingly, it is necessary that this stockholder's action be filed forthwith in order to preserve this cause of action from being lost to the corporation."

In division 6, the complaint alleges that the corporation is made a formal defendant in order to meet the requirements of a stockholder's suit and to bring it before the court, but that the action is really for its benefit and no relief is sought adverse to it or to its property.

The United States met this complaint by moving to dismiss the same on the following grounds:

> (1) The complaint fails to state a claim against the defendant, United States of America, upon which relief can be granted.
>
> (2) That the court lacks jurisdiction because the United States of America has not waived its immunity from suit or consented to be sued upon the claim set forth in the complaint.
>
> (3) The plaintiff does not have the capacity to sue on behalf of the Tucker Corporation or its stockholders; and
>
> (4) The claim is barred by the statute of limitations contained in 28 U. S. C. A. 2401, since it arose more than two years prior to the filing of the complaint herein.

The District Court sustained the Government's motion and dismissed the complaint at plaintiff's costs.

Appellant in support of his contention that the complaint states a case which entitled the TUCKER CORPORATION to relief directs our attention to what this court said in *Asher* v. *Ruppa*, 173 F. 2d 10, on page 12:

> "* * * The law is now settled that upon motions to dismiss a complaint on the ground that it does not state a claim upon which relief can be granted, the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true. *Cool* v. *International Shoe Co.*, 142 F. 2d 318. And if, in view of what is alleged, it reasonably can be conceived that plaintiff can upon the trial make a case which would entitle him to some relief, the complaint should not be dismissed. *Montgomery Ward & Co.* v. *Langer*, 168 F. 2d 182; and *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 404."

We propose to apply the test thus laid down to the facts alleged in the complaint here under attack.

It charges a course of conduct by the Securities and Exchange Commission, its members and agents, or by them in connection with other agencies and employees of the Government, or by them in connection with potential competitors of TUCKER CORPORATION in the automobile manufacturing industry, which scheme of conduct in the normal course of events would and did interfere with and destroy the business of TUCKER CORPORATION. Three specifications as to the nature of the course of conduct charged are pointed out. It is first alleged that in the spring of 1948, they (that is the Commission and its agents and their alleged associates) gave out, or permitted to be given out to a radio broadcaster, information that the TUCKER CORPORATION was about to be investigated for fraud and violation of the law in the management of its business, and that said information was immediately broadcast on a nation-wide hookup.

In the second specification, it is alleged that in the early summer of 1948, they (the same persons indicated in the first specification) began and carried forward an inquisition against the TUCKER CORPORATION and its business, and that in the course of such inquisition they interfered with the corporation's use of its records and instituted and propagated a rumor that the TUCKER CORPORATION business was tainted with fraud and illegality.

The third and final specification is that about the first of March, 1949, they (the same persons) took from the files and publicized a "supposedly" secret report of the inquisition conducted by the Securities and Exchange Commission and delivered the same to a representative of a Detroit newspaper.

The Securities and Exchange Act, as amended, provides (15 U. S. C. 77t):

> 77t.—"(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion,

either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

In section 78u of the same Act (15 U. S. C. 78u) it is provided:

"(a) The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates."

The manifest purpose of the Securities Act is to protect the public against imposition or fraud in the sale of securities in interstate commerce. *Oklahoma-Texas Trust* v. *Securities and Exchange Commission*, 100 F. 2d 888. Moreover, the Act provides that any person hurt by an order of the Commission may petition the Court of Appeals of the United States, in the district wherein such person resides, that such order may be modified or set aside.

The Federal Tort Claims Act (28 U. S. C. 1346) give the district courts of the United States jurisdiction of civil actions "on claims against the United States in money damages, accruing on and after January 1, 1945, for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The question now arises, did the facts alleged in the complaint here in question charge a negligent or wrongful act or omission on the part of any employee of the Government within the scope of his employment? Under the terms of the Securities Exchange Act above quoted the Commission has discretion to direct or file, or cause to be filed, a statement or complaint in writing concerning a matter which it believes to be in the public interest to investigate. It has the power to make such an investigation. It is authorized to publish information concerning violations of the Act.

The act charged in the first specification of conduct complained about is that of giving out information that an investigation was about to be instituted. This is clearly and specifically within the discretionary powers and duties of the Securities and Exchange Commission. The statute quoted authorized such conduct as that charged in the first specification.

In the second specification, the charge is that an investigation was instituted. The investigation is now called an "inquisition." Again the Commission was acting clearly within the scope of its discretionary authority. The same thing is true as to the third act. The conduct complained of in this specification is publishing the report of the investigation or "inquisition." This also is in terms authorized by the specific language of the Securities and Exchange Act. Moreover, the Federal Tort Claims Act (28 U. S. C. 2680) provides:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

It seems therefore to be perfectly clear that under the terms of the applicable statutes the plaintiff in this controversy cannot upon a trial establish a case which would entitle the Tucker Corporation to damages from the Government. What we have said sufficiently disposes of the first and second grounds upon which the Government sought to dismiss the complaint, and it makes it unnecessary for us to consider the third and fourth grounds.

Because the complaint fails to state a claim against the United States upon which relief can be granted, the judgment of the District Court is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 403

GEORGE SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA AND TUCKER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court for the Northern District of Illinois (R. 29-30) is not reported. The opinion of the Court of Appeals for the Seventh Circuit (R. 48-55) is reported at 198 F. 2d 32.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1952 (R. 56). A petition for rehearing was denied August 6, 1952 (R. 71). The

petition for a writ of certiorari was filed on October 21, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action may be maintained against the United States under the Tort Claims Act on a claim based upon the allegedly malicious conduct of members and employees of the Securities and Exchange Commission in undertaking and publicizing an investigation authorized by law.

STATUTES INVOLVED

The pertinent provisions of the Tort Claims Act, of the Securities Act of 1933, and of the Securities Exchange Act of 1934 are set forth in the Appendix, *infra,* pp. 17-19.

STATEMENT

Petitioner, a stockholder of the Tucker Corporation, instituted suit on March 2, 1951 on behalf of the corporation against the United States under the Tort Claims Act asserting that respondent's employees intentionally (R. 6) inflicted (a) the common law tort of injuring and destroying Tucker's business, and (b) the statutory tort of preventing the sale of its product in interstate commerce in competition with other manufacturers in violation of the anti-trust laws (R. 7).

The complaint alleged (R. 4-6) that in the spring and early summer of 1948 the Tucker Corporation was preparing to produce a new type of automobile for sale in interstate commerce; that the corpora-

tion had then converted most of its cash capital into machinery and equipment, inventory, and advertising in preparation for such production and sale; that it had good business relations with its dealers and distributors, with the firms with which it was doing business, and with the automobile-buying public; that beginning in the spring and early summer of 1948 and extending until after March 3, 1949, the Securities and Exchange Commission and its members and agents acting in concert with other agencies of the United States, or in concert with non-governmental persons or firms, "engaged in a course of conduct" which interfered with, injured and destroyed the corporation's business.

Specifically, the complaint alleged (R. 5) that the course of conduct consisted of the following: (1) that in the spring of 1948 the SEC, knowing that such statement would be broadcast nationwide, as it was, surreptitiously gave out a statement to a radio broadcaster that the Tucker Corporation was about to be investigated for fraud and violations of law in its management and in the conduct of its business; (2) that a few weeks later the SEC commenced and carried forward for many months an investigation of the corporation in the course of which it interfered with the use of the corporate records and files, intimidated certain persons doing business with it, propagated a widespread rumor that the corporation's business was tainted with fraud and illegality and that its managing officers were guilty of fraud and violations of law in the conduct of its business; and (3) that

about the first of March, 1949, a member of the SEC delivered to a representative of a Detroit newspaper its "supposedly secret report" of such investigation to enable him to write an article for such newspaper publicizing the contents of the report, which he did.

The complaint further alleged (R. 7-8) that the corporation was subject to a corporate reorganization proceeding under Chapter X of the Bankruptcy Act; that on February 20, 1951, on behalf of the stockholders of the corporation petitioner advised counsel for the corporation's trustee of the existence of this cause of action, which was in danger of being barred by limitations under the Bankruptcy Act on or about March 3, 1951, requesting him to file suit; and that the trustee's counsel stated that he considered the cause of action to be non-existent and not a corporate asset. The complaint then alleged that this constituted an abandonment of the asset by the trustee; that by letters petitioner so advised the trustee and the court having charge of the reorganization proceeding, requesting to be notified to the contrary if such was not their position, and that there was no response. The complaint also alleged that petitioner thereafter notified certain of the corporation's officers and directors of the matter, demanding that they cause the corporation to sue, but to no avail. Petitioner filed the complaint "as a derivative stockholders' action." (R. 3).

Respondent moved to dismiss the complaint on

four grounds[1] (R. 14-15). The district court, in an oral opinion (R. 29-30), sustained the motion on all the grounds asserted by respondent, stressing in particular its conclusion that the conduct and statements of the SEC were privileged and not actionable. The Court of Appeals for the Seventh Circuit affirmed (R. 48-55), holding that the investigation and the giving out of information concerning it were specifically within the discretionary powers and duties of the SEC under 15 U.S.C. 77t, 78u, and that the claim was therefore barred by the discretionary-function exception of the Tort Claims Act (28 U.S.C. 2680 (a)).

ARGUMENT

Petitioner's claim is based upon an SEC investigation and the release of information incident thereto. He contends that because the SEC allegedly was motivated by an intent to injure his corporation's business, its conduct was tortious and beyond its discretionary authority and hence actionable under the Tort Claims Act. These contentions were rejected by both courts below. The dismissal of the complaint, we submit, was plainly correct, involves no conflict of decisions, and presents no issue calling for review by this Court.

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[1] The grounds for the motion were (1) that the complaint fails to state a claim upon which relief can be granted, (2) under the Tort Claims Act, 28 U.S.C. 2680, the United States withheld consent to be sued upon claims of this nature, (3) petitioner does not have capacity to sue on behalf of the corporation or its stockholders, and (4) the claim was barred by the two-year period of limitations, 28 U.S.C. 2401 (R. 14-15).

1. It is firmly established that public officials are immune from suit for damages arising from the acts done by them in the course of the performance of their official duties. *Spalding* v. *Vilas*, 161 U. S. 483; *Yeselli* v. *Goff*, 275 U. S. 503, affirming 12 F. 2d 396 (C.A. 2). Their conduct is absolutely privileged if it has "more or less connection with the general matters committed by law to [their] control or supervision" (*Spalding, supra*, 161 U.S. at 498). The rule obtains without regard to whether such conduct was motivated by malice, dishonesty or other personal intent unrelated to the public good; public policy requires that public officials "should not be under an apprehension that the motives that control [their] official conduct may, at any time, become the subject of inquiry in a civil suit for damages" (*ibid.*) and that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949. This principle, foreclosing judicial inquiry into the motives of official conduct, applies not only to superior officers in the government's departments, but to their subordinates as well[2] and has been held applicable to members of the Securities and Exchange Commission. *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665.

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[2] *Cooper* v. *O'Connor*, 99 F. 2d 135, 142 (C.A. D.C.), certiorari denied, 305 U.S. 643; *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921.

In the instant case, it must be assumed that the investigation and publicity complained of were initiated and accomplished by the SEC in the course of official duty, despite petitioner's failure to include an affirmative allegation to that effect. See *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 46. Otherwise, the Tort Claims Act could not be the basis of the suit.[3] Accordingly, the functions involved being discretionary, the motives of the officials concerned may not be inquired into, since their conduct is absolutely privileged. Their acts may not therefore be the subject of a suit against them individually.[4]

If a person who causes injury is himself free from civil liability, it is obvious that "his employer must also be entitled to a like immunity." *N.O. &*

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[3] Respondent's liability under the Tort Claims Act is limited to claims based upon the wrongful or negligent acts of its employees "while acting within the scope of [their] office or employment." 28 U.S.C. 1346(b).

[4] The records of the court below disclose that there has already been an adjudication that the conduct here complained of was privileged. The investigation resulted in the indictment and trial of certain of the corporation's officers on charges of violating the federal conspiracy and mail fraud statutes and the Securities Act of 1933 (18 U.S.C. (1946 ed.) 88, 338; 15 U.S.C. (1946 ed.) 77q(a)). The defendants were acquitted. Thereupon one of the defendants brought an action against representatives of the SEC and of the Department of Justice and although his complaint sounded in malicious prosecution, its allegations included the very acts which are the subject of petitioner's complaint here. A motion to dismiss was granted, the District Court (Igoe, D.J.) declaring that the officials "are clothed with absolute immunity so far as actions may be brought by individuals contesting the discretion, propriety and manner in which they discharge the same." *Tucker* v. *Kerner*, et al., Civil Nos. 50 C 455 and 50 C 562 (N.D. Ill., May 29, 1950), affirmed, 186 F. 2d 79 (C.A. 7).

N.E. Railroad Co. v. *Jopes,* 142 U.S. 18, 24; *Kendrick* v. *United States,* 82 F. Supp. 430, 432 (N.D. Ala.) Under the Tort Claims Act, respondent assumed the liability for the wrongful and negligent acts or omissions of its employees subject to *respondeat superior* principles. But where the employee is not liable himself because his conduct is privileged, no cause of action exists. For a privileged act does not constitute a tort (*Restatement, Torts,* § 10, Com. a, and see Com. d) and the Tort Claims Act was not intended to create a cause of action where none existed before. *Feres* v. *United States,* 340 U.S. 135, 141, 142. It follows that the complaint fails to state a cause of action upon which relief may be granted. A contrary result would subject public officials to the same hazards and vexations as would be present if they were themselves defendants; their conduct, motives and judgment in the performance of official functions would be the subject of inquiry by both parties to the suit, the plaintiff seeking to impugn them and the United States to defend them.

2. Apart from absolute privilege, and apart also from the fact that petitioner's claim is based upon activities which are peculiarly governmental—activities which cannot be equated to that of a private person as required by the Tort Claims Act (cf. *Feres* v. *United States, supra*)—, the complaint is fatally deficient because the claim falls within the exemptive provisions of the Act, 28 U.S.C. 2680(a), (h), *infra,* pp. 17-18.

(a) The claim is based upon an investigation of the Tucker Corporation by the SEC and the release of information with regard thereto. The purpose of the Securities Acts of 1933 and 1934, as the court below observed (R. 54), is to protect the public against imposition or fraud in the sale of securities in interstate commerce. To that end, the SEC is expressly authorized, "in its discretion", to conduct investigations to determine whether those Acts have been or are about to be violated (Section 20 (a), Securities Act of 1933, 15 U.S.C. 77t(a); Section 21(a), Securities Exchange Act of 1934, 78u (a)), and, "in its discretion, to publish information concerning any such violations" (Section 21 (a), Securities Exchange Act of 1934, 15 U.S.C. 78u (a)). But no action will lie under the Tort Claims Act to recover damages resulting from the performance of discretionary functions, as such claims are barred by the first exception of that Act, 28 U.S.C. 2680 (a). Manifestly, any investigation of a firm by a regulatory agency to determine the presence of fraud or other illegality will interfere with the normal affairs of the firm and will, in all likelihood, be detrimental to its business relations. The paramount interest in protecting the public, however, is the justification for such interference,[5] and it is clear from the legislative history of the Tort Claims Act that Congress intended to preserve

[5] Cf. *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 213; *Harper* v. *Jones*, 195 F. 2d 705, 707 (C.A. 10), certiorari denied October 13, 1952, No. 104, this Term; *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, 101 (C.A. 4).

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[6] This first exception is "designed to preclude application of the bill to a claim against a regulatory agency, such as the * * * Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved." H. Rep. No. 1287, 79th Cong., 1st Sess. (1945), pp. 5-6. An earlier tort claims bill (H.R. 5373, Sec. 303(7), 77th Cong., 2d Sess. (1942)) specifically exempted any "claim for damages caused by the administration of any law or laws * * * by the Securities and Exchange Commission." A subsequent bill (H.R. 6463, Sec. 402(1)) deleted this language and substituted the language which now appears in the first exception to the Tort Claims Act (28 U.S.C. 2680(a)). The House Judiciary Committee explained that, "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific. The general exemption in section 402(1) of H.R. 6463 renders unnecessary the specific exemption of damages caused by the administration of laws by * * * the Securities and Exchange Commission, which appeared in H.R. 5373." Hearings before the House Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (1942), p. 29, and see pp. 28, 33, 64-66.

[7] Even without express statutory authority, no action will lie based upon the release of information to the press or to others. *Glass* v. *Ickes*, 117 F. 2d 273 (C.A. D.C.), certiorari

larly, when investigation is warranted by a lawful purpose, "it is not rendered illegal by some other motive in the mind of the officer" (cf. *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 145).[8]

Moreover, petitioner's reliance upon the distinction between discretionary and ministerial acts (Pet. 5, 16) has no application to the circumstances of this case. A contention that the functions of a regulatory agency are essentially ministerial (*Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 38) was early rejected by this Court. The administrative process has often been likened to the judicial process (*United States* v. *Morgan*, 313 U. S. 409, 422; *Melvin* v. *Pence*, 130 F. 2d 423, 426 (C.A.D.C.)) and the investigatory functions of a regulatory agency equated to those of a grand jury (*Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186, 216; *In re Securities and Exchange Commission*, 84 F. 2d 316 (C.A. 2), reversed as moot, 299 U. S. 504; *Consolidated Mines* v. *Securities and Exchange Commission*, 97 F. 2d 704, 708 (C.A. 9). Both are invested with broad investigative powers.[9]

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denied, 311 U.S. 718; *Jones*, v. *Kennedy*, 121 F. 2d 40 (C.A. D.C.), certiorari denied, 314 U.S. 665; *Mellon* v. *Brewer*, 18 F. 2d 168 (C.A. D.C.), certiorari denied, 275 U.S. 530; *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.); *Chatterton* v. *Secretary of State for India*, (1895) 2 Q.B. 189, 191.

[8] See also, *Tenney* v. *Brandhove*, 341 U.S. 367, 377; *Jones* v. *Kennedy*, *supra*; *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 379 (C.A. 2), certiorari denied, 301 U.S. 684.

[9] As to the SEC, see 15 U.S.C. 77t(a), 77s(b), 78u(a); cf. *Wooley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9). As to the grand jury, see *United States* v. *Johnson*, 319 U.S. 503, 510-511.

The conduct and direction of the investigative phase of the administrative process, like its equivalent in the judicial process, are subjects of discretion and judgment of the officials participating;[10] hence they cannot be viewed as ministerial acts. Compare, *Mississippi* v. *Johnson,* 4 Wall. 475, 499. Petitioner's claim is based upon a federal agency's performance of discretionary functions and is squarely within the first exception of the Tort Claims Act. See, *Coates* v. *United States,* 181 F. 2d 816 (C.A. 8); *Cromelin* v. *United States,* 177 F. 2d 275 (C.A. 5), certiorari denied, 339 U. S. 944.

The cases on which petitioner relies (Pet. 4-6), present no conflict. No question relating to discretionary function was raised or discussed in the lower Courts in *Stewart* v. *United States,* 186 F. 2d 627 (C.A. 7), certiorari denied, 341 U. S. 940.[11] In *Costley* v. *United States,* 181 F. 2d 723 (C.A. 5) the discretionary act (admitting a patient into a Government hospital) was spent before the injurious act (negligent treatment thereafter) occurred. In *Oman* v. *United States,* 179 F. 2d 738 (C.A. 10),[12]

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[10] See, *Okla. Press Pub. Co.* v. *Walling, supra,* 327 U.S. at 217, fn. 57; *Crooker* v. *Securities and Exchange Commission,* 161 F. 2d 944, 949 (C.A. 1); 38 C.J.S. p. 1037.

[11] After the denial of certiorari, the United States sought to amend its Answer so as to include the discretionary function exception. A subsequent decision of the Court of Appeals held that the original failure to plead constituted a waiver of this jurisdictional defense. *Stewart* v. *United States,* (C.A. 7, decided September 22, 1952).

[12] On remand, the United States prevailed. See, *Oman* v. *United States,* 195 F. 2d 710 (C.A. 10).

respondent's employees allegedly aided third parties in interfering with plaintiff's exclusive grazing privilege—conduct which had no legal sanction and which in fact was contrary to their affirmative obligation to safeguard such privileges (179 F. 2d at 742)—whereas here the acts complained of were performed under express statutory mandate (15 U.S.C. 77t(a), 78u(a)). Neither *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, nor *Bank of America N. T. & S. A.* v. *Douglas,* 105 F. 2d 100 (C.A.D.C.) held that erroneous conduct of the SEC gives rise to a suit for damages.

(b) The two torts alleged to have been committed—the injury to the corporation's business and the violation of the anti-trust laws (R. 7)—are not actionable under the Tort Claims Act. The first is an alleged interference with prospective economic advantage, or more particularly, as is evidenced by the complaint (R. 4), an interference with prospective contractual relations. Harper, *Law of Torts* (1933), p. 479; Prosser, *Torts* (1941), pp. 1019, 1020. But Congress, intending that the United States retain its immunity from suits based upon malicious and deliberate torts,[13] expressly excluded from coverage of the Tort Claims Act claims arising out of "interference with contract rights."

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[13] The Act excludes "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). "This section specifies *types* of claim which would not be covered by the title. * * * These exemptions cover claims arising out of * * * *deliberate torts* * * *." S. Rep. No. 1400,

28 U.S.C. 2680(h). These are not words of art and surely must be construed as including not only interference with contracts already made but also interference with prospective contractual relations. The interest in the security of contracts already made is superior to the interest in securing a probable expectancy (*ibid; Restatement, Torts,* §767, Com. c., § 766, Com. c) and it would be difficult to ascribe to Congress an intent that the United States be liable for disturbing a mere expectation of entering into a contract but not be liable for disturbing the contract itself.[14]

As to the anti-trust laws, it is clear that the United States, not being a "person" within their meaning, is not subject to their provisions in the sense that it may be held to have violated them; nor may it sue or be sued for damages sustained by reason of their violation. *United States* v. *Cooper Corp.,* 312 U. S. 600, 606; see also, *United States* v. *Bressler,* 60 F. Supp. 676, 679 (S.D.N.Y.), affirmed 160 F. 2d 403 (C.A. 2). Moreover, the exclusive remedy for such damages is the remedy prescribed

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79th Cong., 2d Sess. (1946) 33 (emphasis ours). See also, H. Rep. No. 1287, 79th Cong., 1st Sess. (1945), 6. The legislative scheme is further indicated by 28 U.S.C. 2674, barring punitive damages.

[14] Interference with precontractual relations is not as widely recognized a tort as is interference with existing contracts. Harper, *Law of Torts, supra.* Respondent can have no liability under the Tort Claims Act unless a private person, in like circumstances, "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Petitioner's complaint has no allegation as to where the allegedly wrongful acts occurred, hence it is not possible to determine whether such conduct would be recognized as tortious.

by such laws, rather than the remedy under the Tort Claims Act.[15]

(c) Moreover, it is apparent on the face of the complaint that petitioner's claim is barred by the two-year period of limitations, 28 U.S.C. 2401. Although the complaint asserts that the course of conduct complained of extended until after March 3, 1949 (R. 4), the accrual of the cause of action is determined by the dates of the specific wrongful acts relied upon, since such acts and dates are petitioner's own particularization of the more general allegation. Cf. *Northern Kentucky Tel. Co.* v. *Southern Bell Co.*, 73 F. 2d 333 (C.A. 6), certiorari denied, 294 U. S. 719. The last act relied upon is the delivery of the SEC investigation report to a newspaper representative on "about the first of March, 1949" (R. 5). The complaint was filed March 2, 1951 (R. 3), just after the statutory period had expired.

3. Finally, even if the complaint states a cause of action, dismissal was proper because petitioner has

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[15] It is well settled that where a statute creates a right and prescribes a remedy, the statutory remedy is exclusive. *Geddes* v. *Anaconda C. M. Co.*, 254 U.S. 590, 593; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, 252. The remedy under the antitrust laws is triple damages (15 U.S.C. 15) and is recognized as punitive in nature. *Johnson* v. *Schlitz Brewing Co.*, 33 F. Supp. 176, 182 (E.D. Tenn.), affirmed 123 F. 2d 1016 (C.A. 6); *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 232 Fed. 574, 577 (C.A. 2). Compensatory damages, even if consented to by a plaintiff, as petitioner purports to do (R. 7), cannot be substituted for the statutory penalty. *Decorative Stone Co.* v. *Building Trades Council*, 23 F. 2d 426, 428 (C.A. 2), certiorari denied, 277 U.S. 594. The Tort Claims Act bars punitive damages (28 U.S.C. 2674) and was not intended to modify the remedies available under the anti-trust laws.

no standing to maintain the action. The property of the Tucker Corporation, including causes of action, was vested in its trustee (Section 186, Bankruptcy Act, as amended, 52 Stat. 892, 11 U.S.C. 586) and exclusive jurisdiction of the corporation and administration of its estate was vested in the bankruptcy court (Section 111, Bankruptcy Act, as amended, 52 Stat. 884, 11 U.S.C. 511). That court "has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced." *Meyer* v. *Fleming*, 327 U. S. 161, 169. Petitioner, as a shareholder of the bankrupt corporation, had standing to petition the bankruptcy court for instructions requiring the trustee to bring suit, but it is settled law that he could not himself sue on behalf of the trustee or the bankrupt without a formal order of the bankruptcy court permitting him to do so. *Porter* v. *Sabin*, 149 U. S. 473; *Klein* v. *Peter*, 284 Fed. 797 (C.A. 8). Petitioner attempts to avoid this rule by asserting that the trustee's inaction resulted in an abandonment of the cause (R. 7-8). But the local court rule provides that a bankrupt's property may not be abandoned without approval of the court [16] and such approval was neither sought nor obtained.

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[16] Rule 19, Rules in Bankruptcy of the United States District Court for the Northern District of Illinois, provides: "* * * The trustee may, *upon approval by the court*, abandon any property of the bankrupt if burdensome or of no realizable value." (Emphasis ours.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1952.

APPENDIX

Pertinent portions of the Tort Claims Act [17] read as follows:

28 U.S.C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exer-

[17] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. (1946 ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U.S.C. (Supp. V) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869. Existing rights and liabilities were not affected by the repeal (62 Stat. 992).

cising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * *

28 U.S.C. 2401 (b).

A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *.

The pertinent portions of the Securities Act of 1933, as amended (48 Stat. 74, 86, 15 U.S.C. 77t (a)) and the Securities Exchange Act of 1934 (48 Stat. 881, 899, 15 U.S.C. 78u(a)), are as follows:

Sec. 20 (a). (Securities Act) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or

otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Sec. 21(a). (Securities Exchange Act) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

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